

**Rule 706. Court Appointed Expert Witnesses.**

(a) **Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) **Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;
- (3) may be called to testify by the court or any party; and
- (4) may be cross-examined by any party, including the party that called the expert.

(c) **Compensation.** The expert is entitled to a reasonable compensation, as set by the court. Except as otherwise provided by law, appointment of an expert by the court is subject to the availability of funds or the agreement of the parties concerning compensation.

(d) **Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

**Comment to 2012 Amendment**

The language of subsection (c) of Rule 706 has been amended to provide, consistent with Federal Rule of Evidence 706, that an expert is entitled to a reasonable compensation, as set by the court.

Additionally, the language of subsections (a), (b), (d), and (e) of the rule has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

**Comment**

Federal Rules of Evidence, Rule 706(b) is appropriate in Federal Courts where the funds to compensate experts are made available by statute. Such funds are not generally available in Arizona except in capital offenses, A.R.S. § 13-673; sanity hearings, A.R.S. § 13-1674; medical liability review panels, A.R.S. § 12-567(B)(4) and (M); and mental health proceedings, A.R.S. § 36-545.04. Therefore, Arizona Rules of Evidence, Rule 706(a) was prefaced by the availability of these funds or the compensation of the experts to be agreed upon, and Federal Rules of Evidence, Rule 706(b) was not adopted, and paragraphs numbered (c) and (d) were renumbered paragraphs (b) and (c) respectively.

## ARIZONA EVIDENCE REPORTER

### Paragraph (a) — Appointment.

706.a.010 The trial court has discretion in determining whether to appoint an expert.

*State v. Hansen*, 156 Ariz. 291, 751 P.2d 951 (1988) (court refused to adopt rule that defendant is entitled to every psychiatric test possible regardless of possible results, and held trial court did not abuse discretion in refusing to appoint neurologist when doctor testified it was possible, although not highly probable, that defendant suffered from post-concussion syndrome, and that even if defendant did suffer from post-concussion syndrome, it was likely she would still be competent to stand trial).

*State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984) (because doctors found no evidence of temporal lobe epilepsy, trial court did not abuse discretion in denying request for further examination).

706.a.020 The United States Constitution may mandate appointment of experts in non-capital cases if the denial of such services would substantially prejudice the defendant.

*State v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (Ct. App. 1980) (defendant failed to establish that refusal to appoint expert to investigate jury selection system prejudiced him).

706.a.030 Trial court should not appoint an expert unless the expert agrees to act and testify.

*State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993) (even though defendant told trial court that doctor in question did not accept court appointments, record showed that doctor testified at trial and at sentencing hearing).

706.a.040 To determine whether a treating physician should be considered a fact witness, for which no compensation is due, or an expert witness, for which compensation is due, the trial court should view the party's disclosure stating the capacity in which the physician will testify, with these considerations: (1) questions about the physician's experience and specialization do not mean the physician is being treated as an expert witness because this information is necessary for the jurors to determine the weight to give to that testimony; (2) if the physician testifies based on information acquired independent of the litigation, or testifies about the who, what, when, where, and why relating to the patient or the patient's records, the physician will generally be testifying as a fact witness; (3) if the physician testifies based on reviewing records of other health care providers, or based on medical research or literature, the physician will generally be testifying as an expert witness; (4) if the physician is asked to give an opinion formulated in the course of treating the patient, the physician will generally be testifying as a fact witness; (3) if the physician is asked to give an opinion in general, the physician will generally be testifying as an expert witness; and (5) asking the physician to explain terms or procedures in a manner the trier-of-fact may more easily comprehend does not turn a fact witness into an expert witness.

*State ex rel Montgomery v. Whitten (Martinez)*, 228 Ariz. 17, 262 P.3d 238, ¶¶ 10–21 (Ct. App. 2011) (more than two dozen physicians and health care professionals treated 7-week-old victim for massive brain injury and skull fractures; when victim died, state charged defendant with murder; state disclosed it would call eight of the physicians as witnesses; court entered order that state would have to pay six of them as expert witnesses; court granted relief to state and apparently ordered trial court to base payment on above considerations).

## OPINION AND EXPERT TESTIMONY

Paragraph (b) — Disclosure of appointment.

No Arizona cases.

Paragraph (c) — Parties' experts of own selection.

No Arizona cases.

April 10, 2013

## ARIZONA EVIDENCE REPORTER